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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

In re M.T., et al., Persons Coming Under
the Juvenile Court Law

H037575
(Santa Cruz County
Super. Ct. Nos. DP002282, DP001744)

SANTA CRUZ COUNTY HUMAN
SERVICES DEPARTMENT,

Plaintiff and Respondent,

v.

S.T., et al.,

Defendants and Appellants.

Shannon T. is the biological mother of three-year-old Aaron T. and was designated the de facto mother of eleven-year-old Matthew T. Steven T. is the presumed father of both children. (We will refer to them hereafter as the parents or, separately, as the mother and the father.) The parents appeal from juvenile court orders terminating their parental rights to the two children. We will affirm the orders.

FACTS AND PROCEDURAL BACKGROUND

On May 26, 2010, the Department filed petitions to make the minors dependents of the juvenile court—Matthew T. under Welfare and Institutions Code¹ section 300, subdivisions (b) and (g) (failure to protect and no provision for support) and Aaron T. under section 300, subdivisions (b) and (j) (failure to protect and abuse of sibling). In essence, and leaving aside allegations regarding Matthew T.’s biological mother Stephanie V., who is not a party to these appeals, the petitions alleged that the parents were abusing drugs, the home was dangerously filthy, and Matthew T. was caring for Aaron T. in the face of the parents’ neglect. The petitions also alleged that the father had been involved in juvenile dependency proceedings before because of drug abuse. The Department did not immediately remove the children from the home, but the next day the juvenile court did so, causing the Department to place them in separate foster care homes.

In making the inquiries that led to the Department’s filing the petitions, officials discovered that the mother tested positive for ingestion of methamphetamine. The father admitted that he was consuming the substance. He was arrested. This was not the father’s first encounter with law enforcement and juvenile dependency authorities because of drug abuse. In 2007, the Department had filed a dependency petition alleging that Matthew T. was at risk because the father had been arrested for outstanding warrants and possession of contraband substances. The father then successfully underwent counseling, residential drug treatment, Narcotics Anonymous, and parenting classes, and was reunited with Matthew T. in September of 2008.

In a report written for a jurisdiction/disposition hearing scheduled for June 29, 2010, the Department stated that the mother initially tested positive for the presence of illegal drugs in her system. She later returned two negative tests but failed to appear for

¹ Further unlabeled statutory references are to the Welfare and Institutions Code.

six others. The father had missed four scheduled drug tests following an initial positive test, but later had a negative test result. Following a settlement conference on July 29, 2010, the juvenile court sustained the petitions and ordered reunification services for both parents (in the case of the mother, only for her biological son Aaron T., because she had not yet been awarded de facto parent status for Matthew T.). Also at the conference, the parties agreed to modify the petition to temper the unsanitary-conditions allegation. The modification deleted the allegation that the home was so filthy as to be physically unsafe for the minors, but did not go so far as to retract the allegation that the home was filthy.

In September of 2010 the parents were still living together. A status review report for a review hearing scheduled for September 28, 2010, related that the mother had entered into a reunification case plan and was complying with its goals, which included abstinence from drug use, Narcotics Anonymous meeting attendance, parenting classes, and counseling. The father, by contrast, was doing poorly. He had eight positive tests for methamphetamine and accordingly was discharged from his outpatient treatment program. Detoxification and residential treatment were recommended for him. The juvenile court warned, in a minute order after the hearing, that it would not order reunification if the parents continued to live together “without authorization.”

On December 21, 2010, the juvenile court designated the mother as Matthew T.’s de facto parent. By then, according to the status review report written for the hearing of that day, the father had moved out of the family’s residence, i.e., apart from the mother. The mother’s visits with the children were going well and she continued to comply with her case plan in an exemplary fashion. The father was making no progress with his case plan; he was not visiting his children and had abandoned efforts at rehabilitating himself. The Department recommended that reunification services for the father be terminated but continue for the mother.

At the beginning of 2011, the Department discovered that the mother was not being honest about her relationship with the father, who, according to an employee for

the property owner, was visiting her regularly enough at the family home that “she assumed that he still lived there.” Another employee “confirmed that [the father] had been living at the apartment consistently since the apartment had been rented to [the mother].” The property owner or its staff had evicted her, a fact she had not reported, and she had left pets behind with no provision for their care. The mother denied all of the foregoing. She had been found, according to an animal control officer who had visited her residence to deal with the abandoned pets, “acting erratically.” The Department decided to place the children with the maternal grandparents, who had been complaining to the authorities about the parents’ treatment of the children from the beginning of the case.

On February 18, 2011, the juvenile court, having been apprised of the foregoing problems, terminated family reunification services for both the mother and the father and scheduled a section 366.26 hearing, i.e., a hearing to decide the children’s permanent future.

On May 31, 2011, the maternal grandparents filed for de facto parent status. Their court papers included a letter from a licensed clinical psychologist. Matthew T. told her that he was afraid to be alone with either parent and did not want to see either of them. She stated her “professional opinion that the child should not be exposed to either [parent] and that this child’s father be ordered to give up his parental rights.”

The Department prepared a report for the section 366.26 hearing on June 14, 2011. It recommended terminating the parents’ rights and letting the maternal grandparents adopt the children.

Each parent filed one or more petitions for modification of a juvenile court order under section 388. In a petition filed on July 19, 2011, the father alleged that he could care for his sons properly and that they were suffering under their temporary placements. He asked for them to be returned to his care. The juvenile court summarily dismissed this petition without a hearing, ruling that it not did state new evidence or allege facts

that, if true, would show a change in circumstances. The court also ruled that granting the petition would not promote the minors' best interests. In a petition filed on October 13, 2011, the one most relevant here, the mother asked that the court reinstate family reunification services. She asserted that circumstances had improved following the termination of her reunification services because she was psychologically stable, continued to avoid drug abuse, was attending Alcoholics Anonymous and Narcotics Anonymous meetings, and was visiting Aaron T. consistently, with the visits going well—in sum, she could provide a suitable home environment for Aaron T.

The juvenile court set the hearing date for the mother's section 388 petition on the same day as the already scheduled section 366.26 hearing. The session to consider both items began on October 24, 2011.

At the hearing, it was not seriously disputed that the mother had a good relationship with her children and was bonded to them. Also, at this juncture Matthew T. was willing to visit with the father if he was under supervision. Matthew T. told a social worker, however, that he had some "residual" doubt that his father could care for him properly. Aaron T., though too young to articulate an opinion, initially showed signs of wariness about his father. An adoption worker reported that Aaron T. would blink repeatedly and look confused when his father tried to display physical affection for him. Aaron T. adjusted to both parents, however, and became happy to see them.

At the hearing, both parents stated that they loved their children and wanted to maintain their family intact. They acknowledged their past deficiencies and stated that they were determined to improve.

The juvenile court ruled that there was no material change in circumstances and that granting the section 388 petitions would not be in the children's best interests. Accordingly, it denied the petitions. Regarding the section 366.26 question, the court found that the children were both generally and specifically adoptable and therefore it was required to terminate parental rights unless there was clear and convincing evidence

that a compelling reason against termination existed. It found that the parent-child beneficial relationship exception to termination of parental rights, available in principle under section 366.26, subdivision (c)(1)(B)(i), did not apply. Among its reasons, which we quote at length in the margin, were that the parents had engaged in evasive and dishonest behavior—the court described this as a “consistent campaign of denial and diversion”—and the mother was unable to surmount her drug use problems or her unhealthy reliance on the father and was depressed. The court opined that the children needed consistency and stability that the parents could not provide. It terminated the parents’ rights but then stated its hope that all of the adults involved in the case would try to maintain family ties.²

² We quote the juvenile court at length. Its statement of reasons for its decisions demonstrates the amount of thought and consideration that it put into them. It stated:

“It was interesting for the Court to hear the comments by both parents. Without a doubt, this Court totally believes that the parents love their children. They come to court. I think their emotions are very sincere regarding the descriptions and their connections with the children. Having missed the children they want to be able to do more. But there is a consistent campaign of denial and diversion. When we had the second detention case, the second petition, Father’s focus was entirely on what happened to Matthew in the first dependency as opposed to taking to heart the fact that he wasn’t filling his role as a parent to keep Matthew safe from his own drug addiction and be able to provide appropriate housing and safe environment for the children. Mother puts it on financial choices. Father also today say[s], you know, if I had made different financial choices then I might have been able to work my case plan. Father’s been working case plans for years, drug treatment programs for years. His [addiction] is bigger than him. [A]nd unfortunately his addiction is bigger than his relationship with either of his sons. And that’s the saddest part of it all.

“And so to say that, well, I made this choice for work, or you know—when I look through the file how many times has dad been to New Life, how many times has dad been to this and that, and then we have the most recent hearing where Father falsified records that he was in a treatment program when in fact he wasn’t. He falls in and out of visits with his son. Does he intentionally not visit his boys? No. I don’t think he intentionally does that. I think he truly loves his children. I don’t think he’s able to have a stable enough lifestyle to be able to be consistent enough for his visits and consistent enough to be a parent for his children. I know he wants to. I know he truly wants to.

(footnote continued)

DISCUSSION

The mother argues that the parent-child beneficial relationship exception to the statutory preference for adoption applies to her. The father joins in her argument and asserts that if she prevails then the California Rules of Court entitle him to restoration of his parental rights.

“Father said that it’s a matter of trust, his children trust him. From his perception he believes his children should trust him. But his kids can’t. You can’t trust a parent that’s not stable and can’t be consistent. And if you can’t trust them to do the simple things such as making sure you’re supported in school, make sure you get to school on time, make sure you have a safe place to live, make sure that basic needs are met, then it’s going to be confusing. I’m not surprised that we have Matthew with a stick hitting a tree out of frustration. He doesn’t have the words, . . . the communication to describe all of his feelings for all the people that are in his life.

“So it’s difficult to know how this will all turn out for Matthew because I think he has been exposed to enough neglect over the years that it’s going to take a long time for him to be able to build relationships knowing that they will be stable, because it’s not what he’s ever been exposed to.

“And with Mother it’s also interesting that she also mentioned the same word trust. Trust was something that she also highlighted and discussed, and that the children trust her and that Matthew trusts her and they can talk to her. But yet Mother, you know, comes in and out of this court saying I’m working my case plan, I’m not with Father, you told me I need to work independently, I’m not with Father. We know she is with Father. Father lives with her. So, you know, Mother isn’t able to get past her own drug use or codependency with Father. Clearly it’s a codependency with Father. Because we’ve unfortunately had times during this case where I’ve pretty much had to say to Mother directly I have to look to you alone to work your case plan to try to reunite. And it hasn’t been possible. Mother hasn’t been able to do that. And so the depression also I think is a big issue that has robbed her from any long term stability.

“So we’re not able to look to a beneficial exception for the children, because at this point they need consistency and stability, and unfortunately they have not been able to have that through the parents’ care or the parents’ relationship when the children haven’t seen the parents for a period of time, or is inconsistent. It’s no doubt very confusing.

“So the Court is not able to find a parental beneficial exception.”

With regard to dispositions in juvenile dependency cases, the best interest of the child controls. (*In re Fernando M.* (2006) 138 Cal.App.4th 529, 534.) Adoption is the preferred alternative. (§ 366.26, subd. (b), (b)(1), (b)(2), (b)(5).) “ ‘The permanent plan preferred by the Legislature is adoption. [Citation.]’ [Citation.] ‘ ‘The Legislature has decreed . . . that guardianship is not in the best interests of children who cannot be returned to their parents. These children can be afforded the best possible opportunity to get on with the task of growing up by placing them in the most permanent plan and secure alternative that can be afforded them.’ ’ ’ ” (*In re Josue G.* (2003) 106 Cal.App.4th 725, 732.)

As noted, the parents claim that the juvenile court erred by not finding the existence of a statutory exception to the adoption preference, specifically the parent-child beneficial relationship exception to adoption defined in section 366.26, subdivision (c)(1)(B)(i). That provision permits a juvenile court to choose an option other than adoption when the parent has “maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” (*Ibid.*)

We recently held that review of a court’s determination of the applicability of the parental or sibling relationship exceptions under section 366.26 is governed by a hybrid substantial evidence/abuse of discretion standard. (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314-1315.) As we explained, “Since the proponent of the exception bears the burden of producing evidence of the existence of a beneficial parental or sibling relationship, which is a factual issue, the substantial evidence standard of review is the appropriate one to apply to this component of the juvenile court’s determination. Thus, . . . a challenge to a juvenile court’s finding that there is no beneficial relationship amounts to a contention that the ‘undisputed facts lead to only one conclusion.’ [Citation.] Unless the undisputed facts established the existence of a beneficial parental or sibling relationship, a substantial evidence challenge to this component of the juvenile court’s determination cannot succeed. [¶] The same is not

true as to the other component of . . . both the parental relationship exception and the sibling relationship exception[, which] is the requirement that the juvenile court find that the existence of that relationship constitutes a ‘*compelling reason* for determining that termination would be detrimental.’ (§ 366.26, subd. (c)(1)(B), italics added.) A juvenile court finding that the relationship is a ‘compelling reason’ for finding detriment to the child is *based* on the facts but is not primarily a factual issue. It is, instead, a ‘quintessentially’ discretionary decision, which calls for the juvenile court to determine the *importance* of the relationship in terms of the detrimental impact that its severance can be expected to have on the child and to weigh that against the benefit to the child of adoption. [Citation.] Because this component of the juvenile court’s decision is discretionary, the abuse of discretion standard of review applies.” (*Ibid.*)

It is immediately apparent that the father does not come under this exception. His record of visiting and maintaining contacts with Matthew T. and Aaron T. has been one of neglect and seeming indifference, notwithstanding his testimony at the contested section 366.26 hearing. Moreover, the father does not raise an independent claim that he qualifies under the parental beneficial relationship exception. Rather, he argues that if this court agrees with the mother’s argument, then he is entitled to the benefits of our decision regarding her status under rule 5.725(a)(2) of the California Rules of Court, which provides: “The court may not terminate the rights of only one parent under section 366.26 unless that parent is the only surviving parent; or unless the rights of the other parent have been terminated under [other statutes not applicable here]; or unless the other parent has relinquished custody of the child to the welfare department.” In addition, we note that rule 5.725(g) of the California Rules of Court similarly provides, and with additional specificity in places: “The purpose of termination of parental rights is to free the dependent child for adoption. Therefore, the court must not terminate the rights of only one parent unless that parent is the only surviving parent, or the rights of the other parent have been terminated by a California court of competent jurisdiction or by a court

of competent jurisdiction of another state under the statutes of that state, or the other parent has relinquished custody of the child to the county welfare department. The rights of the mother, any presumed father, any alleged father, and any unknown father or fathers must be terminated in order to free the child for adoption.”

As will appear, however, we find the mother’s claim unpersuasive, and hence rules 5.725(a)(2) and (g) of the California Rules of Court do not apply in the father’s favor.

To be sure, the mother visited the children often and successfully and stands in a different legal position from the father. Nevertheless, substantial evidence supports the juvenile court’s decision that the beneficial relationship exception should not be exercised in her case.

“If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent’s rights are not terminated.” (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) But to qualify for that exception the mother had to do “more than demonstrate ‘frequent and loving contact’ [citation], an emotional bond with the child, or that [she] and [her] child find their visits pleasant. [Citation.] Rather, [she] must show that [she] occup[ies] ‘a parental role’ in the child’s life.” (*In re Andrea R.* (1999) 75 Cal.App.4th 1093, 1108.) The parent-child relationship must “promote[] the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents.” (*In re Autumn H.*, *supra*, at p. 575.)

The juvenile court did not abuse its discretion (*In re Bailey J.*, *supra*, 189 Cal.App.4th at p. 1315) in finding that the mother had not shown a “compelling reason” (§ 366.26, subd. (c)(1)(B)) to qualify for the exception. She did not demonstrate that Aaron T. would be “greatly harmed” (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575) by ending her parental rights, and the positive nature of their contacts was insufficient by itself. (*In re Andrea R.*, *supra*, 75 Cal.App.4th at p. 1108.) The juvenile

court found that Aaron T. was generally and specifically adoptable and there is no dispute that his foster parents, the maternal grandparents, were prepared to adopt him. They had cared for him for an extended period already, and done so satisfactorily.

The mother takes particular issue with the juvenile court's statement that she was depressed. The court stated: "[T]he depression also I think is a big issue that has robbed her from any long term stability." (*Ante*, fn. 2.) The mother asserts that there is no evidence whatsoever that she was depressed. The Department responds in part that the court's focus lay elsewhere and not particularly on any question of depression and that the court could have directly observed depression by watching the mother during a number of court appearances.

We cannot agree with the Department about the question of focus, because the juvenile court called the mother's purported depression "a big issue." Clearly, it mattered to the court's decision. Conversely, we do agree with the Department that on this record, we cannot reject the possibility that the court was referring to the time it spent observing the mother's demeanor and mental state in the courtroom. Accordingly, we will not reverse the order based on the court's reference to the mother's purported depression. In any event, leaving aside the question of depression, substantial evidence supports the juvenile court's finding, in essence, that the relationship did not "promote[] the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents." (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.)

CONCLUSION

The orders are affirmed.

Duffy, J.*

WE CONCUR:

Rushing, P. J.

Premo, J.

* Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6, of the California Constitution.